

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

ANGELO DENNINGS, on behalf of himself  
and all others similarly situated,

Plaintiff,

vs.

CLEARWIRE CORPORATION,

Defendant.

Case No.

**COMPLAINT — CLASS ACTION**

**JURY TRIAL DEMANDED**

Plaintiff Angelo Dennings, by and through his undersigned attorneys, brings this action on behalf of himself and all others similarly situated. On personal knowledge as to himself and his own activities, and on information and belief as to all other matters, Plaintiff alleges as follows:

**NATURE OF THE CASE**

1. Clearwire Corp., through several subsidiaries (collectively, “Clearwire” or “Defendant”), sells wireless Internet access to consumers. Clearwire promises that its high-speed Internet service provides a “fast” and “always on, always secure” Internet connection allowing users to “[d]ownload pictures, music and videos.” *See* <http://www.clearwire.com/wireless-broadband/overview.php> (last visited November 15, 2010).

2. But Clearwire does not provide an “always on,” “high-speed” connection as it

1 promises. Clearwire purposefully slows the connection of its users because it cannot  
 2 accommodate the high volume of traffic. Clearwire engages in a practice known as “throttling,”  
 3 which is the intentional delay and/or blocking of Internet communications. This practice  
 4 deprives Clearwire customers of the ability to “[d]ownload music and videos,” and leads to slow  
 5 connection speeds.

6 3. Clearwire engages in throttling at times when demand for Internet use is highest,  
 7 beginning at approximately 7:30 p.m. and ending at about 1:00-to-2:00 a.m.

8 4. If users attempt to cancel their service, Clearwire claims that, pursuant to its  
 9 “contract” with them, it is entitled to collect an early termination or a re-stocking fee. The  
 10 “contract” referred to by Clearwire is not a contract between it and its customers. The contract  
 11 between Clearwire and its customers is simply that the customers will pay for, and Clearwire will  
 12 provide, “unlimited” Internet usage at certain speeds, depending on the speed and payment plan  
 13 selected in Clearwire’s stores, kiosks, or online.

14 5. The remaining “terms” invoked by Clearwire at its convenience are embedded in  
 15 a document that consumers never see prior to subscribing to Clearwire’s service. Clearwire sells  
 16 its services in its stores, kiosks at shopping centers, and online. Clearwire’s stores and kiosks do  
 17 not have copies of this “contract” on hand for potential subscribers to read before they “agree” to  
 18 its terms. Users who subscribe through Clearwire’s website never see the contract either because  
 19 the link to it is at the bottom of a page, in substantially smaller font and lighter shade than all of  
 20 the other text on the page. The text states: “Want to read the fine print (and who doesn’t read the  
 21 fine print?) It’s all there in the CLEAR Legal Index.” No one wants to read fine print legalese  
 22 and almost no one does. The statement is obviously and sharply ironic, and mocks anyone who  
 23 may have been fussy enough to have considered continuing.

24 6. Despite not showing its terms to consumers, Clearwire refuses to allow users to

1 cancel their service without paying the unconscionable fees it claims it is owed under this  
 2 “contract.” These fees include an early termination fee (“ETF”), which penalizes consumers that  
 3 want out before the end of the two-year term. Although Clearwire breached its contract with its  
 4 customers, Clearwire insists on the payment of this ETF when customers realize they are not  
 5 getting what they bargained for.

6 7. This class action complaint seeks to end Clearwire’s practices and to recover the  
 7 subscription and early termination fees that subscribers paid for services they did not receive. It  
 8 alleges violations of the Computer Fraud and Abuse Act, 18 U.S.C. § 1030; breach of contract;  
 9 breach of the implied covenant of good faith and fair dealing; and unjust enrichment.

#### 10 JURISDICTION AND VENUE

11 8. This Court has jurisdiction over the Computer Fraud and Abuse Act claim  
 12 pursuant to 28 U.S.C. § 1331, and supplemental jurisdiction over the remaining claims pursuant  
 13 to 28 U.S.C. § 1337. This Court also has jurisdiction over all causes of action asserted herein  
 14 pursuant to 28 U.S.C. § 1332(d) because the aggregate claims of Plaintiff and members of the  
 15 Class exceed the sum or value of \$5,000,000, and there is diversity of citizenship between at  
 16 least one member of the proposed Class and Clearwire.

17 9. Venue is proper in this District under 28 U.S.C. § 1391(a)(1) and (2). Clearwire  
 18 conducts substantial business in this District through the promotion, sale, marketing, and  
 19 provision of its services in this District, and is headquartered in this District.

#### 20 PARTIES

21 10. Plaintiff Angelo Dennings is a citizen of Texas residing in Fort Worth, Texas.  
 22 During the Class Period, Mr. Dennings subscribed to Clearwire’s “Take Two Home” high-speed  
 23 Internet service. According to Clearwire’s website, the Take Two Home package has “no preset  
 24 [download] speed cap” and an upload speed of “1.0 Mbps.” *See*

1 <http://www.clear.com/shop/services> (last accessed November 15, 2010).

2       11. Pursuant to a promotion at a Clearwire mall kiosk, Mr. Dennings agreed to pay  
3 \$50 per month for the service. The cost of the Take Two Home service, according to  
4 Clearwire's website, is typically \$60 per month. Mr. Dennings subscribed to Clearwire in  
5 August of 2010. In early October of 2010, Mr. Dennings noticed that his Internet speeds  
6 dropped drastically at around 8 p.m. each day, when he was trying to stream movies from  
7 Netflix.com, a ubiquitous online movie rental service, to watch with his family. Using third-  
8 party Internet speed testing software, Mr. Dennings determined that at about 8 p.m. each day, his  
9 Internet speed dropped to approximately 0.03 Mbp/s, far too slow for him to stream movies or  
10 otherwise perform the sorts of activities for which users typically purchase high-speed Internet.

11       12. Mr. Dennings contacted Clearwire to inquire about this problem and spoke to a  
12 representative who identified herself as "Peggy." During that conversation, Mr. Dennings  
13 jokingly asked "Are you guys throttling me?" Peggy replied "Let me check" and then said "Yes,  
14 you are on a managed account." Peggy elaborated that Clearwire had signed up more customers  
15 than its cell towers could accommodate, and that therefore it was "managing" users' accounts.

16       13. Mr. Dennings demanded that Clearwire cease throttling his account. The  
17 Clearwire representative, "Peggy," stated that this was impossible because the throttling is  
18 performed by an automated system over which she had no control.

19       14. The next day, when Mr. Dennings attempted to contact Clearwire's corporate  
20 headquarters in Kirkland, Washington to resolve the situation, he was told to contact customer  
21 service. Mr. Dennings has since spoken to two other Clearwire technicians and each verified  
22 that the throttling is performed by a uniform, automated system that is beyond their control.

23       15. Mr. Dennings next called Clearwire to cancel his service. Although Mr.  
24 Dennings explained the problem, and although Clearwire had not lived up to its end of the

1 bargain, the Clearwire representative nonetheless told Mr. Dennings that he would have to pay  
2 an ETF. As of November 1, 2010, that fee was \$219.<sup>1</sup>

3 16. Clearwire did not disclose its throttling practice or its practice of charging ETFs  
4 even when it engaged in throttling. If Clearwire had disclosed these facts, Mr. Dennings would  
5 not have paid a premium for Clearwire's service, and would not have agreed to an ETF.

6 17. Defendant Clearwire is a corporation organized under the laws of Delaware,  
7 headquartered at 4400 Carillon Point, Kirkland, Washington 98033. Defendant's most recent  
8 form 10-Q, filed with the Securities and Exchange Commission on August 5, 2010, states that as  
9 of June 30, 2010, Defendant's "networks covered an estimated 62.2 million people," including  
10 "approximately 940,000 retail and 752,000 wholesale subscribers as of June 30, 2010."

11 **CLEARWIRE PROMISES, BUT DOES NOT DELIVER,**  
12 **HIGH-SPEED ALWAYS-ON INTERNET SERVICES**

13 18. Clearwire provides wireless Internet access for a monthly fee.

14 19. Clearwire's website, which is prominently displayed on monitors in its stores,  
15 promises "fast" and "reliable" "high-speed Internet" suitable for "[d]ownload[ing] movies and  
16 music." See <http://www.clearwire.com/wireless-broadband/overview.php> (last visited October  
17 28, 2010).

18 20. Clearwire's website contains a FAQ section that reads, in relevant part:

19 Q: Is Clearwire as reliable as cable or dial-up?

20 A: Yes. With Clearwire, you'll enjoy an always-on, always-secure connection that  
never ties up your phone line.

21 Q: How does Clearwire's speed compare to DSL, cable and dial-up?

22 \_\_\_\_\_  
23 <sup>1</sup> The amount of the Early Termination Fee varies based on the equipment that the  
24 subscriber has purchased and the length of time a subscriber has had the service. It can be as  
high as \$250 or as low as \$10. Additionally, if subscribers lease their equipment rather than  
purchase it, there is a flat \$40 "re-stocking" fee. See <http://www.clear.com/legal/etf> (last  
accessed November 15, 2010).

1 A: Clearwire lets you connect at broadband speeds of up to 2.0Mbps. That's up to 25  
2 times faster than typical dial-up! Check out our comparison chart or speed demo  
3 to see how Clearwire compares to other Internet services.

4 The following is a comparison of the average time to download a 3.75MB video clip:  
5 28.8Kbps dial-up modem: 17 minutes, 47 seconds  
6 56Kbps dial-up modem: 9 minutes, 9 seconds  
7 Clearwire's 1.5Mbps: 20 seconds!

8 <http://www.clearwire.com/support/faqs.php> (last accessed November 15, 2010).

9 21. Elsewhere, Clearwire's website states:

10 Why is Clearwire better?

11 Fast – Up to 25x faster than dial-up

- 12 ○ Download pictures, music and videos
- 13 ○ Up to 2.0Mbps download / 256k upload speeds

14 Reliable – Always on, always secure

- 15 ○ No waiting for connections
- 16 ○ It's our network – we own it, we operate it

17 <http://www.clearwire.com/wireless-broadband/overview.php> (last accessed November 15, 2010).

18 22. Clearwire offers several different service plans with different caps on download  
19 speeds. Even Clearwire's slowest plan, however, has a purported download speed of 1.5 Mbps,  
20 which is approximately the same speed as a T-1 line used by large businesses. This plan is  
21 advertised as a "fast and affordable alternative to DSL or Cable." *See*

22 <http://www.clear.com/shop/services> (last accessed November 15, 2010).

23 23. Clearwire's other plans expressly represent that there is "No preset speed cap."  
24 *Id.* Clearwire represents that these plans are its "fastest Home Internet [plan] with the speed you  
need for gaming, streaming videos, downloading large files and more." *Id.* All of the service

1 plans offered by Clearwire for home Internet access purport to offer “Unlimited usage – All the  
2 Internet you want with no extra service fees.” *Id.*

3 24. The literature provided to potential subscribers by sales staff in Clearwire’s stores  
4 and kiosks similarly promises “Unlimited Internet service,” with either “No cap” or “Up to 1.5  
5 Mbps” download speeds.

6 25. Clearwire’s representations have allowed it to charge prices comparable to the  
7 DSL and Cable Internet services it claims are its competitors: Clearwire’s prices for Internet  
8 access range from \$35/month to \$110/month.

9 26. Unbeknownst to consumers, Clearwire caps its Internet users at speeds  
10 significantly below 1.5 Mbps. Consequently, none of Clearwire’s plans are “fast [] alternative[s]  
11 to DSL or Cable.” The usage also is not “unlimited”; it is limited, intentionally, by Clearwire.  
12 This practice renders Clearwire’s services a bad choice for any application, and especially bad  
13 for “gaming, streaming videos, downloading large files,” or anything else requiring high-speed  
14 access.

15 27. Clearwire lacks sufficient cell towers to transmit all of the data generated by its  
16 Internet customers. In order to cope with demand, Clearwire reduces the amount of data that any  
17 one user can transmit. Clearwire places a hidden “cap” on each user’s data. Once a user has  
18 exceeded this undisclosed “cap,” Clearwire drastically reduces that user’s Internet speed during  
19 peak hours of usage. This is commonly known as “throttling.”

20 28. Clearwire throttles online traffic by transmitting information back and forth  
21 between Clearwire’s servers and customers’ computers. That information is used by Clearwire’s  
22 servers to track how much data a customer has uploaded or downloaded. When a customer  
23 reaches his or her “cap,” Clearwire’s servers transmit another message, this time to the router  
24 that prioritizes Internet traffic on Clearwire’s network. That message essentially instructs the

1 router to lower the priority of data transferred by those users who have exceeded their “cap.”

2 29. Clearwire’s throttling results in users experiencing download speeds of  
3 approximately .03 Mbps during the peak Internet usage hours between 7:30 or 8 p.m. and  
4 1:00a.m. to 2:00 a.m. A download speed of 0.03 Mbps is insufficient for users to perform any of  
5 the functions for which broadband or “high-speed” Internet is necessary, and is anachronistically  
6 inadequate for any reasonable use. During these hours, users cannot “stream movies” or  
7 “download music and video” as Clearwire promises, and simply surfing the web becomes an  
8 exercise in patience.

9 30. When users complain to Clearwire, they are told that nothing can be done because  
10 the throttling is automatic. When they then seek to cancel their contracts, they are told that  
11 Clearwire will not waive the early termination fee contained in its one-sided contract. Users are  
12 given the unappealing “choice” of paying a monthly fee for a service that is not what was  
13 promised, paying a lump sum in advance to cancel that service, or not paying anything and  
14 facing collection actions and damaged credit.

15 31. Plaintiff has been damaged and has incurred losses as a result of Clearwire’s  
16 conduct. Plaintiff is paying for fast Internet service but is getting slow Internet service that he  
17 could have bought for a fraction of the cost. Plaintiff is unable to use certain features that were  
18 promised by Clearwire, including “streaming video and music,” because of the slow speed.

19 32. Clearwire does not disclose its throttling policy and practice to potential  
20 customers. Although Clearwire’s ETFs are referred to in some of its literature, nothing tells  
21 potential subscribers that Clearwire will still claim that the fee must be paid when Clearwire  
22 itself is in breach of the contract.

23 33. Instead of properly disclosing these practices, Clearwire provides potential  
24 customers in its stores and kiosks with a pamphlet emphasizing the purported “benefits” of its



1 service. On the last page of the pamphlet, in type smaller than the rest of the text, the pamphlet  
 2 states “Actual CLEAR network performance may vary and is not guaranteed. See relevant pages  
 3 at [www.clear.com](http://www.clear.com) for coverage map, rate plan, equipment purchase/lease, and additional  
 4 information and restrictions.” To say that performance may vary and is not guaranteed, and then  
 5 direct consumers to divine for themselves the “relevant pages” of a website, is very different  
 6 from what actually occurs – the intentional and dramatic slowing of customers’ Internet  
 7 connections by Clearwire. Consumers in stores or kiosks are not given the terms and conditions,  
 8 and agree only to purchase internet service for a certain duration at a certain price.

9 34. Similarly, the “Terms and Conditions” are not provided to users who subscribe  
 10 online. Consumers subscribing to Clearwire through the Internet are asked only to select a plan,  
 11 provide their home address, and input credit card information. Only at the bottom of the page, in  
 12 text substantially smaller and in lighter color than the rest of the page, does Clearwire state  
 13 ironically: “Want to read the fine print (and who doesn’t want to read the fine print)? It’s all  
 14 there in the Clear Legal Index.” This dismissive phrase fails to disclose to users that the “fine  
 15 print” contains important information. Instead of urging consumers to read important  
 16 information about their subscription, Clearwire belittles this segment as “fine print” that  
 17 Clearwire ironically acknowledges no one wants to read.

#### 18 CLASS ALLEGATIONS

19 35. Plaintiff incorporates and realleges the above paragraphs.

20 36. Plaintiff brings this action as a Class Action pursuant to Federal Rule of Civil  
 21 Procedure 23 on behalf of a Class consisting of: all persons in the United States who purchased  
 22 Internet access from Clearwire during the period from November 15, 2004 until the final  
 23 disposition of this action (the “Class Period”). Excluded from the Class are Clearwire, any entity  
 24 that has a controlling interest in Clearwire, and Clearwire’s current or former directors, officers,

1 and counsel.

2 37. The requirements of Rule 23 are satisfied because:

3 (a) Numerosity: The Class is so numerous that joinder of all members as individual  
4 plaintiffs is impracticable. While the exact number of Class members is unknown and can only  
5 be ascertained via discovery, Plaintiff believes that there are hundreds of thousands, if not  
6 millions, of Class members.

7 (b) Commonality: There are questions of law and fact common to the Class,  
8 including:

- 9 (i) whether Clearwire has violated the Computer Fraud and Abuse Act;  
10 (ii) whether Clearwire has breached its contract with consumers;  
11 (iii) whether it is unconscionable for Clearwire to charge users an ETF;  
12 (iv) whether Clearwire has breached its duty of good faith and fair dealing;  
13 (iv) whether Clearwire has been unjustly enriched by the practices alleged

14 herein; and

15 (v) whether, because of Clearwire's misconduct, Plaintiff and the Class are  
16 entitled to damages, restitution, equitable relief or other relief, and the amount and nature of such  
17 relief.

18 (c) Typicality: Plaintiff's claims are typical of the claims of the Class because  
19 Plaintiff and members of the Class each sustained damages arising out of Clearwire's wrongful  
20 conduct as complained of herein; and

21 (d) Adequacy: Plaintiff will fairly and adequately protect the interests of the Class.  
22 Plaintiff has no interests that are antagonistic to, or in conflict with, the interests of the Class as a  
23 whole, and has engaged competent counsel, who are highly experienced in class actions and  
24 complex litigation.

(e) The prosecution of separate actions by the members of the Class would create a risk of adjudications with respect to individual members of the Class that would, as a practical matter, be dispositive of the interests of the other members not parties to the adjudications, or substantially impair or impede their ability to protect their interests; (b) the prosecution of separate actions by the members of the Class would create a risk of inconsistent or varying adjudications with respect to the individual members of the Class, which would establish incompatible standards of conduct for Clearwire; (c) Clearwire acted or refused to act on grounds generally applicable to the Class; (d) questions of law and fact common to members of the Class predominate over any questions affecting only individual members, and a class action is manageable and superior to other available methods for the fair and efficient adjudication of the controversy.

## THEORIES OF RELIEF

### Count I:

#### VIOLATION OF THE COMPUTER FRAUD & ABUSE ACT, 18 U.S.C. § 1030

38. Plaintiff incorporates and realleges the above paragraphs as if set forth fully herein.

39. This theory of relief arises under 18 U.S.C. § 1030.

40. Plaintiff's and class members' computers are "protected computers" within the meaning of 18 U.S.C. § 1030(e)(2)(B).

41. As set forth above, Clearwire is violating 18 U.S.C. § 1030(a)(5)(A) by intentionally causing the transmission of a program, information, code, or command that has impaired and damaged the integrity or availability of data, information, and/or a system.

42. As a result of Clearwire's violation of the CFAA, Plaintiff and the other class members have suffered, and will continue to incur damage and loss, the aggregate amount of

1 which is at least \$5,000 for a 1-year period during the Class Period.

2 43. Such damage includes the inability of Plaintiff and Class members to access data,  
3 information and/or systems, including without limitation the Internet and data typically retrieved  
4 from the Internet, via their computers due to Clearwire's throttling practices.

5 44. Such loss includes, but is not limited to, the aggregate payment by Plaintiff and  
6 Class members for high-speed Internet services that were not received due to Clearwire's  
7 improper practices, the aggregate costs incurred by Plaintiffs and Class members to prevent the  
8 effects of Clearwire's throttling, and the aggregate costs incurred by Plaintiff and Class members  
9 to obtain information elsewhere once it became apparent that they could not receive it from their  
10 computers due to Clearwire's throttling, including their payment of Clearwire's ETF or re-  
11 stocking fees.

12 45. Moreover, Plaintiff and the Class have incurred costs of at least \$5,000 because  
13 the costs associated with bringing the instant lawsuit, including attorney fees and expert fees,  
14 would not have been incurred had it not been for the interruption of services caused by  
15 Clearwire.

16 46. Clearwire's intentional interference with its subscribers' connection to the  
17 Internet, violates the Computer Fraud and Abuse Act, 18 U.S.C. § 1030, and Plaintiff and the  
18 Class are, thus, entitled to economic damages subject to proof at trial.

19 **Count II:**

20 **BREACH OF CONTRACT**

21 47. Plaintiff incorporates and realleges the above paragraphs as if set forth fully  
22 herein.

23 48. Plaintiff and the Class members entered into a contract with Clearwire to pay  
24 monthly fees in exchange for unlimited high-speed Internet service.

51. Clearwire unjustifiably breaches the contract by intentionally interfering with Plaintiff and Class members' access and use of Clearwire's high-speed Internet service and, therefore, Plaintiff and the class are entitled to damages subject to proof at trial.

## BREACH OF THE COVENANT OF GOOD FAITH AND FAIR DEALING

53. Clearwire, through its advertising and marketing of its high-speed Internet service, makes uniform representations and offers regarding the quality of its high-speed Internet service.

55. Clearwire breached the implied covenant of good faith and fair dealing by knowingly failing to provide Plaintiff and Class members with the service they desired, paid consideration for, and thought they would receive.

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1 charging ETF or re-stocking fees to Plaintiff and the Class members, while knowing that it had  
2 failed to hold up its end of the bargain.

3 57. As a direct and proximate result of the breaches set forth herein, Plaintiff and  
4 Class members have suffered, and continue to suffer, damages in an amount to be proven at trial.

5 **Count IV:**

6 **UNJUST ENRICHMENT**

7 58. Plaintiff incorporates and realleges the above paragraphs as if set forth fully  
8 herein.

9 59. Clearwire's conduct unjustly enriched Clearwire, to the detriment of the Class, by  
10 causing Clearwire to receive payments for a high-speed Internet service that it did not provide,  
11 and allowing it to reap early termination fees or re-stocking fees from those who would not abide  
12 by Clearwire's breach of contract.

13 60. Plaintiff and Class members have been injured by paying for a high-speed Internet  
14 service that they did not receive, or by paying to terminate Clearwire's service.

15 61. Clearwire's retention of funds paid by Plaintiff and Class members violates the  
16 fundamental principles of justice, equity, and good conscience.

17 62. Clearwire, therefore, should be ordered to return any funds obtained as a result of  
18 its deceptive scheme to the Class.

19 **PRAYER FOR RELIEF**

20 Plaintiff and all Class members pray that this Court provide the following relief:

21 A. Certify this action as a class action under Rule 23;

22 B. Order Clearwire to pay Plaintiff and Class members an amount of actual, direct,  
23 incidental, consequential, and exemplary damages (to the extent available) to be determined at  
24 trial;

1 C. Declare that Clearwire's ETF or re-stocking fees are unconscionable under these  
2 circumstances;

3 D. issue an injunction preventing Clearwire from continuing its deceptive marketing  
4 campaign and preventing it from charging early termination fees;

5 E. award pre- and post-judgment interest, to the maximum extent permissible;

6 F. award attorney's fees and costs of suit, to the maximum extent permissible; and

7 G. for such other and further relief this Court may deem just and proper.

8 **JURY DEMAND**

9 Plaintiff demands a trial by jury on all claims so triable as a matter of right.

10 Dated: November 15, 2010

Respectfully submitted,

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